United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-2100

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

original

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GUSTAVE ZURAK, WILLIAM MC AULIFFE, SALVATORE ZAMBUTO, WILLIE MACK, BENJAMIN SANTIAGO, MARTIN HALPERN, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

-against-

PAUL J. REGAN, BENJAMIN WARD, RAYMON DORSEY, WILLIAM BARNWELL, FRANK CALDWELL, MAURICE DEAN, MARTIN GILBRIDGE, FRANK GROSS, ADA JONES, MILTON LEWIS, JOHN MAFFUCCI, LOUIS PIERRO, JOHN QUINN, and ANGEL LUIS RIVERA, Commissioner of New York State Board of Parole, individually and in their official capacities,

Defendants-Appellants.

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P/S

BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

UNITED STATES COURT OF APPEALS
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GUSTAVE ZURAK, WILLIAM MC AULIFFE, SALVATORE ZAMBUTO, WILLIE MACK, BENJAMIN SANTIAGO, MARTIN HALPERN, on behalf of themselves and all others similarly situated,	:	
Plaintiffs-Appellees,	:	
-against-	:	Docket No. 76-2100
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Defendants-Appellants.	:	

BRIEF FOR APPELLANTS

Question Presented

Does due process entitle an applicant for conditional release to a personal appearance before a parole commissioner and the processing of his application for conditional release within a specified period and in a particular order.

Statement

This is an appeal from an order of the United States District Court for the Southern District of New York dated July 30, 1976 (Carter, J.) which granted plaintiffs, as a class, injunctive relief and ordered (1) that conditional release applications pursuant to New York Penal Law § 70.40(2) be processed in order of eligibility and within 60 to 90 days of an inmates arrival at Rikers Island, (2) that the Parole Board provide each inmate whose application for conditional release is denied or deferred a statement of the reasons for such action together with a written statement of the facts relied upon in reaching such decision and (3) that applicants for conditional release be accorded the right to a personal appearance before a Parole Board commissioner. The class consists of all inmates of New York City Correctional Institution for Men, Rikers Island, New York, who are eligible or will be eligible for conditional release pursuant to New York Penal Law § 70.40(2).

New York Penal Law Section 70.40(2)

> 2. Definite sentence. A person who is serving one or more than one definite sentence of imprisonment with a term or aggregate term in excess of ninety days may, if he so requests, be conditionally released from the institution in which he is confined at any time after service of sixty days of that term, exclusive of credits allowed under subdivisions four and six of section 70.30. In computing service of sixty days, the credit allowed for jail time under subdivision three of section 70.30 shall be calculated as time served. Conditional release from such institution shall be in the discretion of the parole board, and shall be upon such conditions as may be imposed by that board in accordance with the provisions of the correction law.
>
> Conditional release shall interrupt service of the sentence or sentences and the remaining portion of the term or aggregate term shall be held in abeyance. Every person so released shall be under the supervision of the parole board for a period of one year. Compliance with the conditions of release during the period of supervision shall satisfy the portion of the term or aggregate term that has been held in abeyance.

New York Penal Law Section 70.40(2) applies only to individuals serving definite sentences. A definite sentence under New York Law never exceeds one year. All misdemeanors carry definite terms of imprisonment of one year or less. New York Penal Law § 70.15. Additionally

Class D and E felons may receive a definite term of imprisonment of one year. New York Penal Law § 70.00(4). Sentences in excess of one year may only be imposed for felonies and are classified as indeterminate sentences under New York Law. The minimum period of imprisonment is 3 years, the maximum period of imprisonment is life. New York Penal Law § 70.00. An indeterminate sentence of imprisonment must be served at a state correctional facility; a definite sentence of imprisonment, i.e., a term of one year or less, is served at a county or regional correctional institution. New York Penal Law § 70.20.

Prior to 1967, a felon was eligible for parole after serving two thirds of his minimum term. This is no longer the procedure in New York. In 1967, the entire Penal Law of New York was revised. Under the current law, a minimum date of imprisonment as fixed by the sentencing court is the first date an individual becomes eligible for parole. This can never be less than one year and may be as much as twenty-five years. New York Penal Law § 70.00(3). If the court does not fix a minimum, the Parole Board must fix the minimum, and again, this may not be less than one year. New York Correction Law § 212(2). Once paroled, an individual remains under parole supervision until his maximum term expires.

An applicant for conditional release pursuant to New York Penal Law § 70.40(2) spends, at most, one year incarcerated if he is not released prior to the expiration of his term.* On the other hand, an individual committed to state prison spends a minimum of three years incarcerated if he is not released on parole prior to the expiration of his term. Under the New York statutory scheme, it is only the felon serving his term at a state prison who meets the Parole Board personally and not the applicant for conditional release pursuant to § 70.40(2).

The Hearing

Gustave Zurak testified first. He stated that he arrived at Rikers Island about November 21, 1974(5),** that he applied for conditional release (7), and that around March 6, 1975, he was informed his application had been denied (12-13).

Martin Halpern testified that he arrived at Rikers Island on April 30, 1975. He was sentenced to a one year definite term on May 5, 1975 in the Queens County Supreme Court having violated probation imposed after his

* Moreover, pursuant to New York Penal Law § 70.30(4) inmates serving definite terms of imprisonment are allowed up to one-third good behavior time, reducing a one year sentence to eight months.

**Numbers in parentheses refer to pages of the hearing held by the District Court.

conviction of the sale of marijuana, a controlled substance (31). He applied for conditional release (33). On September 5, he was informed that his application was deferred until November (36-37).

Benjamin Santiago testified that he is serving a definite term of imprisonment on Rikers Island. He was first incarcerated on the charge on June 30, 1975 and arrived at Rikers Island the same day (43-44). He applied for conditional release (45). He testified he had not yet heard about his application for conditional release (52).

Salvatore Zambuto testified that he is serving a definite term at Rikers Island. He was convicted on April 8, 1975. On April 11, 1975 he arrived at Rikers Island. He applied for conditional release (55-56). He was denied conditional release, he believes July 10 (59).

Maitland Jones testified he is serving a 9 month definite sentence at Rikers Island. He arrived at Rikers Island on June 11, 1975 (63-64). He applied for conditional release (65). He has neither been denied nor granted conditional release (66).

Willie Mack testified he began his definite sentence on Rikers Island on April 18, 1975 (73). He arrived at Rikers Island on April 23 (74). He applied for conditional release (75). He was denied conditional release on July 24 (80).

Lawrence Kavanaugh testified that he is Assistant Director of Field Operations, Division of Parole, Department of Correctional Services, State of New York. He stated he has been with the Parole Board since 1942 (87). The parole officers under his supervision are involved in the conditional release program for inmates in local penitentiaries throughout the State excluding New York City (88). Mr. Kavanaugh testified that inmates sentenced to definite sentences committed to any local correctional system are eligible for conditional release if they received a term of more than 90 days after they have served 60 days of the sentence (89). So far as jail time is concerned, he may receive credit on the 60 days up to 30 days (89).

In addition to the facilities of the Department of Corrections of the City of New York, there are five local penitentiaries in the State and 58 County jails (89).

Joseph Salo testified that he is the Executive Secretary to the New York State Board of Parole (115), and that he coordinates the Parole Board schedule (116). He explained that the Parole Board conducts various types of hearings: parole eligibility hearings, establishing minimum periods of imprisonments, parole revocation proceedings, executive clemency hearings and certificates of good conduct and relief from disabilities. The Parole Board meets in panels of three with the exception of establishing a minimum period of imprisonment at work camps where the younger offender is sent (117). In 1974, the Parole Board conducted a total of 13,888 hearings at which inmates personally appeared (123). The yearly calendar of the Parole Board was put into evidence (Defendants' Exhibit "D"). Mr. Salo testified that given the current 12 member Parole Board and supporting staff, it would be impossible to schedule hearings for all conditional release applicants at the local correctional facilities (128).

Raymond Dorsey testified that he is the Supervising Officer, New York State Department of Correctional Services located at Rikers Island. He testified that the conditional release applications are submitted to the Parole

Board as soon as possible; this would average anywhere from between 60 to 90 days (156). The folders are taken to the New York City office on a Friday and are acted upon by the end of the following week. He has currently six officers under his jurisdiction (158). Approximately 3,000 men ultimately have the right to apply for conditional release (162).

The file that goes to the Parole Commissioner includes a description of the offense for which the applicant is serving time, the inmates response to whether or not he feels he was fairly treated, whether he denies or admits his crime (168). The file also includes a summary of the man's previous record. A social history is also included. This is obtained from the individual and the City probation report if one is available (168). A parole officer's evaluation may be included. Finally, the release program is discussed, i.e., where the applicant is going to live, does he have a job (169).

All reports are included in the folder that is submitted to the Commissioner. Additionally, any letters sent to the parole officer by interested individuals writing on behalf of the applicant are included (169). A decision on a conditional release application is made by one Commissioner (97). If an application is denied or deferred, the reasons for such denial are provided to the applicant in writing (98, 164)(Defendants' Exhibit "E"). The applicant may apply to the Chairman of the Parole Board for reconsideration (98).

The Opinion Below

The District Court granted plaintiffs class action status, the class to consist of all inmates incarcerated at the New York City Correctional Institution for Men on Rikers Island who are eligible or will be eligible for conditional release.

The Court went on to hold that a prisoner's interest in prospective parole must be accorded due process protection. The Court concluded that since the statute requires that applications be considered any time after

service of sixty days, due process requires that applications be processed in order of eligibility and that the determination be made within 60 to 90 days. The Court further held that each applicant is entitled to a specific and meaningful statement of reasons and the facts underlying a denial or deferral of conditional release. Finally, the Court concluded that due process requires that the applicants be granted a personal appearance before the Parole Board.

ARGUMENT

THE REQUIREMENTS OF DUE PROCESS IMPOSED UPON THE STATE BY THE DISTRICT COURT ARE WITHOUT LEGAL OR FACTUAL SUPPORT. THE DISTRICT JUDGE ERRONEOUSLY WAS ATTEMPTING TO SUPERVISE THE STATE CONDITIONAL RELEASE SYSTEM.

In concluding that appellees are entitled to a personal appearance before a parole commissioner, the processing of their applications in order of eligibility, and a decision by the parole commissioner within 60 to 90 days of their arrival at Rikers Island, the District Court failed to analyze the nature of the appellees' interest in conditional release as required by Mathews v. Eldridge, 44 USLW 4224 (U.S. Feb. 24, 1976), and unwarrantedly extended United States ex rel. Johnson v. Chairman, New York State Board of Parole, 500 F. 2d 925 (2d Cir. 1974), vacated as moot, 419 U.S. 1015 (1974) which merely held that felons in state prison are entitled to a written statement of reasons when release on parole is denied.

As explained by the United States Supreme Court in Mathews v. Eldridge, supra at 4229:

> "...[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors. First the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail..." Mathews v. Eldridge, 44 USLW 4224, 4229 (U.S. Feb. 24, 1976).

Analyzing the facts at bar in light of these considerations, it is clear that the procedures surrounding the grant of conditional release pursuant to New York Penal Law 70.40(2) are consistent with the dictates of due process of law.

Due process is not a technical conception that requires a hearing under each and every circumstance. Cafeteria and Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1965). "[D]ue process is flexible and calls for such procedural protections, as the particular situation

demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

Pursuant to New York statute, inmates at state prison meet the Parole Board personally prior to a determination of their eligibility for Parole. The District Court concluded that appellees at bar should have the same right in connection with conditional release notwithstanding they are not statutorily entitled to such a meeting. However, the stake of an inmate at local jail in conditional release is considerably different from the stake of a state prisoner in parole prior to the expiration of his maximum term.

Appellees, at bar, are inmates serving definite terms of imprisonment at Rikers Island. The maximum sentence any member of the class may receive is one year. Additionally, appellees are eligible for good time credits which may reduce their period of imprisonment by one-third of their total term. New York Penal Law 70.30(4). Thus, even assuming a maximum term of one year, the most time any individual would have to serve would not exceed eight months. Of course, many of the inmates at Rikers Island do not even receive terms as long as one year so that the total period of imprisonment, with or without good time

credits, may reduce itself to weeks or a few months. On the other hand, a felon in a New York State prison seeking release from an indefinite sentence is faced with a much greater "loss" than his counter-part serving a definite sentence. The least an indefinite sentence recipient can receive is a sentence of three years and he may receive a term as high as life imprisonment. When released on parole, a parolee has thus gained a diluted liberty that would be denied for him for years unlike the applicant for conditional release.

The interest of the appellees in conditional release and the felons in parole is different in another respect found important by this Court in United States ex rel. Johnson v. Chairman, New York State Board of Parole, supra.* In Johnson, this Court focused on the substantial expectation that a felon in state prison has to expect parole prior to the expiration of his maximum term. This Court pointed out that in 1972, the New York State Board of Parole released 4,412 inmates on parole or 75.4% of the inmates coming before it, concluding at 928:

* The Supreme Court will consider the Kentucky parole procedures in Scott v. Kentucky Board of Parole, scheduled for argument during the weeks of October 4 and 12, 1976. 45 USLW 3192 (U.S. Sept. 21, 1976).

"Thus, the average prisoner having a better than 50% chance of being granted parole before the expiration of his maximum sentence, has a substantial interest in the outcome."

Unlike the petitioner in Johnson, appellees at bar are applying for conditional release pursuant to New York Penal Law § 70.40(2). The Parole Board figures for 1974 (Defendants' Exhibit "B") show that of 2,578 applicants for conditional release, only 746 applications were approved, less than 29%.* Moreover, since many of the inmates at local penitentiaries do not ever apply for conditional release, the overall percentage figure of inmates released on conditional release is significantly less than this figure.** Such statistics hardly give rise to any substantial expectation of release.

* The percentage of inmates approved for conditional release is relatively small because most of the inmates suitable for the program will have already received suspended sentences, probation or short prison terms. Since the inmate is at the institution a very short time prior to decision on his application, the Parole Commissioner will be relying on essentially the same information available to the sentencing judge, the city probation report which is available to the applicant at the time of sentencing pursuant to N.Y. CPL § 390.50(2).

** The conditional releasee who violates is returned to the local jail or penitentiary owing all of the sentence remaining at the date of his release. He gets no credit for "street time". In addition, if released, he remains under supervision for one year regardless of the term that was imposed. For these reasons, many inmates of local jails and penitentiaries do not apply for conditional release.

Indeed, such statistics raise the question of whether the stake of the potential conditional releasee in his future release is the kind of interest to which due process even applies. As reaffirmed by the United States Supreme Court in Meachum v. Fano, 44 USLW 5053, 5056 (U.S. June 25, 1976),

> "We reject at the outset that any grevious loss visited upon a person by the State is sufficient to invoke the procedural protections of the due process clause."

See also Board of Regents v. Roth, 408 U.S. 564, 570 (1972). "[T]he determining factor is the nature of the interest involved rather than its weight." Meachum v. Fano, supra at 5056. Appellees at bar, in view of the small number of inmates conditionally released from local jails and penitentiaries, have no legitimate expectation justified by state law that they will be released prior to their maximum expiration date.

In addition to the differing stakes of the potential parolee and conditional releasee due to the length of incarceration and the expectation of release, the information

being considered by the parole board on an application for conditional release does not warrant the hearing accorded the felon being considered for parole.

Inmates at Rikers Island who apply for conditional release are seen by a parole officer who compiles a folder of relevant information for submission to the parole commissioner who will render the decision. The parole officer interviews the applicant and prepares a report which includes a description of the offense for which the applicant is serving time, sets forth the applicant's previous record, his social history and his release program. This information is usually obtained from the individual and the City probation report which the applicant has already seen prior to sentencing. He is, thus, either the source of or familiar with all the information that will be considered by the Commissioner.

Unlike prisoners serving indefinite sentences who must serve a period of years before they are eligible for parole, the inmate at Rikers Island applies for conditional release shortly after his arrival at the local penitentiary

and is eligible for release within 60 days. Over the course of years, the inmate serving an indefinite term has amassed much documentation in his file indicating his institutional adjustment, character, attempts at rehabilitation and willingness to comport with institutional rules and accordingly, there is a greater need to provide a personal interview. In contrast, the decision on conditional release occurs shortly after committment. Rarely in the short two to three month period involved will the inmate have developed the kind of institutional record the Parole Board considers in the case of a felon serving an indefinite term. The projection of the conditional release applicant will have recently been completed as a result of a presentence or probation report prepared for the sentencing judge. In this light, the utility of a personal appearance by the applicant for conditional release process before a parole commissioner is more limited.

It should also be noted that the applicant may include in the folder that goes to the Parole Commissioner any information or letters that he feels will help his case. Significantly, not one inmate at the District Court hearing testified that he had additional information to bring to a Commissioner's attention. Finally, the parole officer is not an adversary but is there to help the applicant.

Significant here is the fact that applicants for conditional release receive a statement of reasons and facts underlying a denial or deferral of their application.* Accordingly, applicants are able to seek reconsideration and review if they believe that erroneous information has formed the basis of a decision to deny or defer conditional release.

Conditional release from local jails and penitentiaries began on September 1, 1967 with the effective date of the New York Penal Law. Prior thereto, there were no provisions for early release from jails for those serving definite sentences not greater than a year. The program

* The District Court held that appellees were entitled to a statement of reasons and the facts underlying a denial or deferral. However, in so holding, the District Court ignored New York Correction Law § 214 which provides for a statement of the facts and the reasons for denial. Mr. Dorsey and Mr. Kavanaugh testified that such written statements were being supplied starting August 1975.

was instituted under budgetary limitations that did not contemplate personal appearances before the Parole Board. As explained by Joseph Salo, Executive Director of the Board, there are an insufficient number of Parole Commissioners and inadequate support staff to permit each applicant for conditional release to meet with a member of the Parole Board. The New York Board of Parole, consisting of twelve members, is obligated to conduct personal interviews of almost 14,000 prisoners seeking release from state prison. To require that they personally meet and interview the approximately 2,600 applicants for conditional release each year pursuant to § 70.40(2) would be impossible, particularly where these individuals may be housed in sixty-three different local detention facilities scathered throughout the state in addition to the various institutions in the New York City area.

Such a requirement in the face of the Parole Board staffing would only further delay decisions on conditional release applications, a delay about which appellees are already concerned. Additionally, it would have the effect of decreasing the attention felons in state prison receive from the Parole Board, delaying and prejudicing the consideration

of these individuals for parole who are more substantially affected by such decisions.

Finally, to grant plaintiffs relief might undo the entire provisions of § 70.40(2), require its repeal, and leave individuals sentenced to definite terms of one year or less to serve their entire term in full, less only good time credits. The federal government has just recently eliminated parole by the United States Board of Parole for inmates serving terms of one year or less. 18 U.S.C. 4200(f).

Insofar as the District Court held that due process requires that appellees receive a decision on their application for conditional release within 60 to 90 days after their receipt at Rikers Island, appellants are particularly mystified since in the circumstances of this case, no such holding may be determined by reference to the procedural dictates of due process. This issue raises a question of state law only. Moreover, in ordering that the applications be processed in order of eligibility, the District Court was intruding into the management and

administration of the conditional release system. Federal Courts "do not sit to supervise prisons" and latitude must be accorded to prison officials in the administration of prison affairs. Cruz v. Beto, 405 U.S. 319, 321 (1972). Cf. Rizzo v. Goode, 44 USLW 4095, 4100-4101 (U.S. January 21, 1976).

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED AND JUDGMENT ENTERED FOR THE APPELLANTS.

Dated: New York, New York
September 28, 1976

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MARILYN LISI , being duly sworn, deposes and says thats he is employed in the office of the Attorney General of the State of New York, attorney for defendants-appellants herein. On the 28th day of September , 1976 , s he served the annexed upon the following named person :

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Attorney in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Marilyn Lisi

Sworn to before me this
28th day of September , 1976

Assistant Attorney General
of the State of New York